

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air) File No. 15-MD-2666
Warming Devices Products) (JNE/FLN)
Liability Litigation)
) October 18, 2018
) Minneapolis, Minnesota
) Courtroom 12W
) 9:45 a.m.
)
)

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

And THE HONORABLE DAVID T. SCHULTZ
UNITED STATES MAGISTRATE JUDGE

(STATUS CONFERENCE)

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1 P R O C E E D I N G S

2 (9:42 a.m.)

3 THE COURT: Good morning. Please be seated. Nice
4 to see everybody again after quite a while. You've given
5 the court reporter your appearances. Let me just check and
6 make sure that people on the phone can hear me.

7 Okay, people on the phone, I've got a list of who
8 you all are, but would someone say something just so I know
9 you can hear what's going on?

10 COUNSEL: Yes, we can hear, Your Honor.

11 THE COURT: All right. I'm muting you now. And,
12 Ms. Zimmerman, do the people on the phone know who is in the
13 courtroom?

14 MS. ZIMMERMAN: We have not introduced ourselves.

15 THE COURT: On the plaintiffs' side, we have
16 Gabriel Assaad, Kyle Farrar, Jan Conlin, and Genevieve
17 Zimmerman. Correct?

18 PLAINTIFFS' COUNSEL: Yes.

19 THE COURT: And on the defense side, we have
20 Jerry -- is it Blackwell? And Ben Hulse and Mary Young and
21 Bridget Ahmann?

22 MR. BLACKWELL: Correct, Your Honor.

23 THE COURT: I've got a note that there are some
24 plaintiffs in the audience but that's not part of the
25 record.

1 All right. Shall we just go through the joint
2 agenda? And, first, let me make sure I've got the right
3 one. Also, Judge Schultz is here on the bench for the
4 benefit of the folks on the phone. And that's it. There's
5 just the two of us on the bench today.

6 I was getting updated joint agendas in pretty
7 rapid succession there for a while, so I have what I think
8 is the most recent one.

9 MR. HULSE: Yes, Your Honor. That's on me. I'm
10 responsible for the typo. The one that's entitled,
11 "Corrected Joint Agenda Report" is the correct one. The
12 only difference was the date.

13 THE COURT: All right. And I do have that one in
14 front of me.

15 MR. HULSE: Thank you, Your Honor.

16 THE COURT: The joint agenda starts with pretrial
17 orders and case schedule. Before we get to that, why don't
18 we cover the motions to dismiss. That's you, Mr. Hulse?

19 MR. HULSE: Yes, Your Honor. Would you like to
20 take PTO23 or the PFS motions first?

21 THE COURT: Well, let's take them in the order I
22 have them, which would be the PTO23. Oh, let's do it in
23 your order. We'll do the PFS ones. Let me find that here.

24 We have one bucket. I understand we're now using
25 the word "buckets." One bucket of cases as to which there

1 has been no response, and I don't see any reason not to
2 grant the motion. And that would be: *Johnson*, 17-2426;
3 *Hanks*, 17-5052; *Lykes-Traver* 17-5327; *Meyers*, 17-5426;
4 *Shoaf*, 18-167; *Brabham*, 18-262; *Hughes*, 18-665; *Brown*,
5 18-802; *Stidham*, 18-840; *Wiggins* 18-842. Those will be
6 dismissed.

7 MR. HULSE: A note on *Wiggins*, just for the
8 record, Your Honor, we did receive a PFS on the 8th.
9 However, it did not include an authorization or
10 verification, and about half of the core areas were
11 deficient too. So we think that should still be dismissed.

12 THE COURT: Those will all be dismissed, the ones
13 that I listed.

14 There was a response in *Bresnock*, *Potter*, *Swales*,
15 *Weaver*, *Moore*, *Edwards*, *Johnston*, *Billings*, *Collins*, and
16 *Winegar*.

17 *Bresnock*, *Potter* and *Swales*, we'll take those
18 three first. *Bresnock*, the deficiency is that he indicated
19 a claim for loss of future wages or income but then put not
20 applicable for the approximate amount lost and offered no
21 basis for calculating the losses. Is that the objection to
22 the -- is that the --

23 MR. HULSE: Your Honor, beyond that, there was a
24 group of three cases that were subject to the Court's Order
25 that said they had to be cured, fully cured by August 31st.

1 The parties are in agreement, as I understand it, that they
2 were not cured by August 31st. And if the Court wants to
3 see it, we have an e-mail exchange that confirms that.

4 So --

5 THE COURT: Okay, so that's *Bresnock, Potter* and
6 *Swales*?

7 MR. HULSE: That's *Bresnock, Potter* and *Swales*,
8 correct, Your Honor.

9 THE COURT: Is it true that there was not anybody
10 disagree on the plaintiffs' side? All right. *Bresnock*,
11 *Potter* and *Swales* are dismissed. And those are, so *Bresnock*
12 is 17-5371. *Potter* is 17-4881. And *Swales* is 18-00045.

13 *Weaver* then, 17-4754, no --

14 MR. HULSE: Your Honor, this is like many cases we
15 had before where the plaintiffs' counsel isn't challenging
16 the motion on the merits but indicates that they've been
17 unable to reach their client.

18 THE COURT: And does anybody, let me unmute -- the
19 phone people are unmuted. Does anyone either in court or on
20 the phone disagree with what --

21 MR. LEE: Your Honor?

22 THE COURT: -- with what Mr. Hulse just said?

23 MR. LEE: Your Honor, can you hear me?

24 THE COURT: Mr. Assaad is standing. That's not
25 you talking, is it?

1 MR. ASSAAD: No, Your Honor.

2 MR. LEE: Your Honor, this is Dae Lee for
3 Bernstein Liebhard. I was trying to call in, but I don't
4 think you could have heard me, but on *Potter, Edwards* and
5 *Johnston*, yes, I wish to be heard.

6 THE COURT: It's *Potter, Swales* and *Bresnock*.

7 MR. LEE: Okay. So *Potter, Swales* and *Bresnock*.

8 THE COURT: Right. Do you want me to give you the
9 case numbers again?

10 MR. LEE: No, no, I have it in front of me. So
11 for plaintiff *Potter*, as per the Court's ruling on
12 August 16th, we served the amended PFS on August 23rd. And
13 defendant waited until August 31st to notify us that there
14 was some missing information. As soon as we learned that,
15 we served another PFS curing the deficiency, and I don't
16 think there's any deficiency pending right now.

17 MR. HULSE: Your Honor, we disagree with that.
18 Two things: One, I think as Mr. Lee has indicated, there
19 were deficiencies as of the deadline. We notified
20 plaintiffs' counsel of those deficiencies. They didn't
21 contest them. They did serve new PFS's afterwards.
22 However, they didn't meet the deadline.

23 Further, if we're going to go into the details.
24 They also served photocopies verifications with the dates of
25 the original signatures whited out and new dates written in,

1 which is not a proper practice.

2 THE COURT: They can't have done that. Let me
3 make sure that that didn't happen. So let me ask the is it
4 Mr. Lee on the phone?

5 MR. LEE: Yes.

6 THE COURT: Is Mr. Hulse mistaken on that?

7 MR. LEE: No, we did not white out the date and
8 then serve it with, we didn't do that, and that is
9 completely wrong. I'm not sure where he is getting that
10 idea from.

11 MR. HULSE: I'd be happy to offer to the Court the
12 copies of the original and the supplemental PFS
13 verifications, and it's obvious to the naked eye that these
14 are photocopies with the dates changed, and that includes
15 also the other three Bernstein Liebhard cases that are at
16 issue.

17 THE COURT: Did I hear you -- I just want to make
18 sure that I heard you correctly, Mr. Lee. You said you did
19 or did not?

20 MR. LEE: We did not white out the dates and then
21 resubmit it. Plaintiffs might have done it on their own,
22 but we did not.

23 THE COURT: Do you disagree that the plaintiffs
24 maybe did it? Mr. Hulse has a file on the podium, and I
25 don't know what's in it, but he's representing what you just

1 heard, that he has the original documents.

2 Okay, what about the *Swales* case? That is 18 --
3 45, is that your's also? No?

4 MR. HULSE: *Swales* is Mr. Lee's case, Your Honor.

5 THE COURT: Okay, Mr. Lee, is *Swales* your case?

6 MR. LEE: Yes. We served the PFS, according to
7 your Order dated August 16th, the PFS was served on
8 August 30th. It was missing an information. I believe it
9 was question 6, section 6, part 1, which asked, "Describe
10 any other further harm or consequences that you suffered as
11 a result." That section was not answered, so I contacted
12 the plaintiff, my client, and then we served the PFS,
13 another amended PFS right away on September 4th.

14 THE COURT: Mr. Hulse?

15 MR. HULSE: They did. They agreed with us that
16 the PFS was still deficient as of the Court's deadline of
17 August 31st. They did serve a new PFS several days
18 afterwards, and it once again contains the same error around
19 verification. It's the same verification, same signature
20 from the plaintiff with just the date changed.

21 THE COURT: Okay, and there's no response to the
22 other harm part? Is that the fundamental deficiency?

23 MR. HULSE: I do believe that was cured by the
24 September 4th, the post-deadline PFS.

25 THE COURT: And then what's the non-cured

1 deficiency?

2 MR. HULSE: So it's the verification.

3 THE COURT: Okay. Mr. Lee, was there a
4 verification?

5 MR. LEE: I believe verification was served.

6 THE COURT: Let me just let Mr. Hulse flip through
7 the file here and see what he's got.

8 MR. HULSE: Yes, it's the same for all of
9 Mr. Lee's cases. A verification was served. It is clear to
10 the naked eye that it's the same as the old verification,
11 and the date has been changed, and you can even see on this
12 one that part of the signature line has been whited out, so
13 somebody whited it out and put in a new date.

14 THE COURT: All right. And is that going to be
15 true for *Bresnock* also?

16 MR. HULSE: Yes.

17 THE COURT: Here's what we're going to do.
18 Mr. Lee, you disagree with the reading Mr. Hulse has of
19 these documents. I'm not looking at the documents. I won't
20 look at them until Mr. -- until you have a chance to do
21 whatever it is that you want to do about it, which may be
22 will be to contact Mr. Hulse and take a look at it or
23 something. But if you have some disagreement with the
24 representation that Mr. Hulse is making, then just get that
25 in writing before the next status conference. So within

1 30 days, and we'll hold off on ruling on *Bresnock, Potter*
2 and *Swales*.

3 UNKNOWN VOICE: Your Honor?

4 THE COURT: All right. Is that Mr. Lee again? Or
5 is this somebody else?

6 UNKNOWN VOICE: No, Your Honor. This is someone
7 else, Your Honor. May I be heard?

8 THE COURT: On *Bresnock, Potter* and *Swales*?

9 UNKNOWN VOICE: No, Your Honor. The phone was on
10 mute previously when you had *Brabham*, 18-262.

11 THE COURT: Hold on, let me find it. And could we
12 have your name, please?

13 MR. WALKER: Yes, Your Honor. This is Travis
14 Walker.

15 THE COURT: And you're a lawyer where?

16 MR. WALKER: I'm a lawyer in Florida with the law
17 office of Travis Walker.

18 THE COURT: And you're talking about one of your
19 cases which is *Brabham*, 18CV00262 that was listed in the
20 plaintiffs filing no response to the 15th motion to dismiss.
21 Yes, Mr. Walker.

22 MR. WALKER: Yes, Your Honor. It came to our
23 attention when we heard the name, we were surprised because
24 it was our understanding that we had filed a response. We
25 have the PFS in hand for the response. It's my

1 understanding in speaking to the paralegal that one of the
2 two buttons on the portal was pressed but didn't get
3 processed.

4 We're just asking for an opportunity to file that
5 responsive PFS. We have it in hand and, you know, we
6 apologize to the Court. We weren't able to talk about this
7 previously, but we are prepared to file that PFS.

8 THE COURT: All right. Well, just file it then
9 within -- file it today. File it by close of business
10 today, and we'll take a look at it. So I will hold off on
11 ruling on *Brabham*.

12 MR. WALKER: Thank you, Your Honor.

13 THE COURT: All right. Now that the phone line is
14 open, is there anyone else on *Johnson, Hanks, Lykes-Traver,*
15 *Meyers, Shoaf, Hughes, Brown, Stidham, Wiggins?* All right.
16 What about -- I'm going to name some new cases now. And let
17 me know if anyone on the phone wants to be heard on these.
18 And that would be *Weaver*, 17CV4754.

19 MR. ASSAAD: That's our case, Your Honor.

20 THE COURT: *Moore*, 17CV2901.

21 MR. ASSAAD: Our case as well.

22 THE COURT: And *Edwards*, 17CV4891?

23 MR. LEE: Your Honor, that's my case.

24 THE COURT: It sounds like Mr. Lee; is that right?

25 MR. LEE: Yes.

1 THE COURT: *Johnston*, 17CV5270; *Billings* --

2 MR. LEE: Yes.

3 THE COURT: Mr. Lee, was that you again?

4 MR. LEE: Yes, Your Honor. *Edwards*, *Johnston*,
5 *Billings* are our cases.

6 THE COURT: Okay. And so that's *Billings*,
7 17-5277?

8 MR. LEE: Yes, Your Honor.

9 THE COURT: *Collins*, 18CV1175?

10 MR. LEE: That's mine too, Your Honor. And
11 *Winegar*, I think that's 18-CV-0123 is mine too.

12 THE COURT: Okay, *Winegar*. And, Mr. Lee, have you
13 communicated with counsel on the steering committee about
14 these?

15 MR. LEE: Yes, Your Honor. I believe I sent an
16 e-mail to one of the PSC members.

17 THE COURT: Okay, and who is it? So you know who
18 is in court today. Is there any one of those members that
19 you communicated with that you want to present your argument
20 in person?

21 MR. LEE: I got to look into my e-mail, but I
22 think it's the Pritzker law firm.

23 THE COURT: Nobody in court is raising their hand
24 to say they were nominated. So let's take a look at your
25 cases. So you do not have *Weaver*, and you do not have

1 *Moore*, correct?

2 MR. LEE: Correct.

3 THE COURT: *Weaver* is dismissed. That is 17-4754.
4 All right. *Edwards*, 17-4891.

5 MR. HULSE: Your Honor, *Edwards*, *Johnston*, and
6 *Billings* were not part of that August 31st deadline, but
7 they do exhibit the same issue with the signatures on
8 verifications where they appear to us to be obviously whited
9 out dates and signed.

10 And I just wanted to add that at our request,
11 plaintiffs' liaison counsel we know did bring this issue of
12 whiting out verification dates and resubmitting them with
13 new dates to the attention of all plaintiffs' counsel
14 earlier this year and indicated their agreement with us that
15 this is an unacceptable practice, and so that's why we stood
16 on this issue. It's not new to anybody. Mr. Lee and his
17 firm are aware of it. Everybody is aware of it.

18 THE COURT: Yes, Mr. Lee is just denying that
19 happened.

20 MR. HULSE: I understand.

21 MR. LEE: Your Honor, this was never raised in
22 their motion, and their motion was brought because of the
23 deficiency elicited in the PFS, which is now cured.

24 THE COURT: All right. But, Mr. Lee, let me just
25 ask you the more specific question that we discussed with

1 respect to *Bresnock, Potter* and *Swales*, is it your position
2 that Mr. Hulse is wrong in that these are not whited out and
3 redated, resigned?

4 MR. LEE: No. We -- our position is that we did
5 not white it out. Plaintiffs, my client, our client might
6 have done it, but we did not. We did not white it out and
7 resubmit it.

8 THE COURT: And, Mr. Lee, is there an attorney
9 from the plaintiffs' steering committee in court today who
10 you would entrust to take a look at the documents that
11 Mr. Hulse has with him and represent whether they do or do
12 not appear to be what defense counsel has represented?

13 MR. LEE: Anybody from PSC, no.

14 THE COURT: Any volunteers? Ms. Zimmerman is
15 volunteering.

16 MS. ZIMMERMAN: In all candor, the difficulty, I
17 think at least from my perspective, not as a handwriting
18 expert to the extent that this is somebody printing their
19 name and signing it, we all kind of print and sign our name,
20 and they're regularly going to look pretty similar. And I
21 think that to the extent that there's any dispute, perhaps
22 we can try and get Mr. Lee to have brand new copies
23 executed.

24 THE COURT: Well, that's not going to work because
25 that is an issue that we've been through before, so the

1 question is whether what was submitted qualifies?

2 Okay. Mr. Lee, just for your comfort, we've got
3 all four lawyers pouring over these documents right now.

4 MR. LEE: Your Honor, I just want to note on the
5 record that defendants never put this issue in their motion.

6 MR. HULSE: That's not accurate, Your Honor.

7 THE COURT: All right. But we're not talking
8 about that is more of a legal procedural matter. Right now
9 we're focusing on the factual dispute.

10 MS. ZIMMERMAN: Your Honor, based on our review, I
11 mean he's an Officer of the Court, and he's represented
12 that's not what happened. There's not anything that I can
13 see --

14 THE COURT: Just to interrupt you. That's not
15 exactly what he's representing. He's representing that the
16 plaintiffs may have done it. He doesn't know. So he's
17 representing that he didn't do it himself, but he's not
18 representing that it did not happen.

19 MS. ZIMMERMAN: Okay.

20 THE COURT: In fact, he specifically said the
21 plaintiffs may have done it themselves.

22 MS. ZIMMERMAN: Okay. Based on my review and,
23 again, I'm not an expert on handwriting. I don't see that
24 it's so obviously whited out. I mean, I think that the
25 signatures and the printing are similar. I don't see any

1 white-out marks, you know, but --

2 THE COURT: Well, I guess there's no option but to
3 take a look at it. Ms. Zimmerman and Mr. Hulse, would you
4 hand up one?

5 (Voice of operator on phone.)

6 THE COURT: I don't know what that was. Mr. Lee,
7 are you still there?

8 MR. LEE: Yes, Your Honor.

9 THE COURT: All right. Let's take one.

10 MR. HULSE: I may need to organize it a little
11 bit.

12 MS. ZIMMERMAN: And I didn't look at those yet.

13 THE COURT: So someone on the phone put us on
14 hold, and we're getting the notices that our call is
15 important to them. So as a result of that, I'm going to,
16 while I look at these documents, I'm going to put the
17 telephone calls on mute.

18 What we have here is all of them, right?

19 MR. HULSE: Your Honor, I just passed up two. I
20 can pass up the rest too.

21 THE COURT: Oh, I see. Okay, so *Potter* and
22 *Swales*. All right. Well, *Potter*, is an -- I don't know if
23 it's white out or whatever it is, but I find that the dates
24 are clearly different. So this is not a person who is
25 routinized in their handwriting that there does not appear

1 that the style differences don't appear on different dates.
2 And the printed name and the signature line not only for
3 Ms. Potter but also for Mr. Potter are completely and
4 totally identical. And even if in theory you can have one
5 person whose signature and printing was so routinized that
6 even the uptick of the pen remained the same, it's not
7 believable that that would happen with two people. So
8 *Potter* is dismissed.

9 *Swales*, let's look at *Swales*. Counsel, why are
10 there three copies? So we've got three copies of
11 August 29th and three or four, no, no, we have four copies
12 of the August 29th. One was in the wrong paper clip. Is
13 there any reason why you have multiple copies of these?

14 MR. HULSE: Multiple copies for the other parties,
15 right.

16 THE COURT: All right. So, Mr. Hulse, on *Swales*,
17 do you have any original s? These are both photocopies and
18 especially the August 31st one is a little bit faint.

19 MR. HULSE: They're the PDFs that were submitted
20 to us by plaintiffs' counsel, so we don't have an original
21 signature. There in *Swales*, I would note the date, it's the
22 second line I believe actually, you can see the signature
23 line has been whited.

24 THE COURT: Are you talking about the line itself?

25 MR. HULSE: The line itself.

1 THE COURT: Oh, I see. Maybe, yeah, and that
2 might be a little bit true on the first line also. Between
3 the A and the L, and between L and the S. Also, under --
4 well, back in the August 29th one, you've got that same on
5 the first line, the same I don't know if partial apparent
6 obliteration of the line to the right of the S. So I'm not
7 so persuaded by that whitening out of the line business
8 because strange things seem to be happening with the line on
9 both. So I'm not going to -- I think it's -- I guess on
10 *Swales*, I can't really tell.

11 MS. ZIMMERMAN: I just received an e-mail from
12 Mr. Lee. He's trying to -- he's on mute because somebody
13 put us on hold, but he asked that he be given the
14 opportunity to provide copies of all the signatures that
15 have been submitted thus far in the *Potter* matter. And I
16 tried to reply to see how many that might be, but he
17 certainly thinks that that would be an important issue for
18 the Court.

19 THE COURT: Okay. *Potter* is dismissed. *Swales*,
20 I'm not comfortable making a decision on what I've got on
21 *Swales*. So if you've got something else on *Swales* or
22 anybody else does, I guess I could take that. But the
23 interesting thing about the *Swales* is that the signatures
24 and the printed are absolutely identical. You hold them up
25 to the light, they are a hundred percent identical, so that

1 is a strong indicator that it is a cut and paste.

2 The thing that struck me, this seems to be the
3 signature of quite an old person, and the dates, she starts
4 her dates exactly the same distance from the left side of
5 the line both times and that's an indication of the sort of
6 routinization that was missing in the *Potter* case. So I
7 mean maybe, yeah, it's not completely the same because the
8 dash between the 31 and the 2018 is obviously really
9 different from the dash between the 29 and the 2018, but I
10 can see how somebody would do that differently. But the
11 distance from the left is something that you, you know, I
12 don't know. Anyway. I can't make the finding on *Swales*.

13 MR. HULSE: Your Honor, I also have passed up the
14 *Bresnock* case, which I think, at least personally, I think
15 looks pretty clear-cut.

16 THE COURT: And I'm going to look at *Bresnock*
17 right now. It's almost like *Bresnock* never put the date on
18 the September 4th one. The handwriting of September 4th is
19 completely different than the handwriting of the
20 August 24th.

21 MR. HULSE: Your Honor, another possibility about
22 what may happen sometimes, Your Honor, is that --

23 THE COURT: Wait a minute. Wait a minute here.
24 The 9-4-18 on *Bresnock* is identical to the 9-4-18 on *Potter*.
25 Wait a minute. Wait a minute.

1 The 9-4-18 on *Bresnock* is not anything like it
2 appears not to have been made by the same person who did the
3 date August 24, '18 on *Bresnock*. The August one appears to
4 be the same or similar handwriting to the signature of
5 *Bresnock*, loopy, and what's the right word? Kind of not --
6 not the handwriting of a mechanical engineer.

7 The 9-4-18 is a more pinched, precise writing, but
8 what's really concerning the Court right now, really
9 concerning, is now I am comparing the 9-4-18 on *Bresnock*
10 with the 9-4-18 on *Potter*, and let's say the eight,
11 obviously, the ink mark is heavier. This person starts
12 their 8's strongly on the right, gets lighter as the loop is
13 completed.

14 Mr. Lee, any explanation for this September 4, '18
15 similarity between *Potter* and *Bresnock*? You're off mute.
16 All right. Hearing nothing. And that's not trend *Swales*,
17 which is yet another reason why *Swales* seems different from
18 *Potter* and *Bresnock*. All right. *Potter* and *Bresnock* are
19 dismissed.

20 We can go on and on about the similarities between
21 the 9-14-18 on *Bresnock* and *Potter*. The dash lines between
22 the dates go the same distance below the line. You know,
23 you don't have to know the first thing about handwriting to
24 see that those are probably made by the same person. All
25 right.

1 All right. I'm handing back the *Bresnock*, *Potter*,
2 and *Swales* papers. So just to be clear, the motions denied
3 on *Swales* based on what we have. If there's something else,
4 bring it to our attention, but the white-out argument is
5 rejected on *Swales*.

6 MR. HULSE: Understood.

7 THE COURT: And it sounds like we are asked to
8 conduct this same factual inquiry with respect to *Edwards*?

9 MR. HULSE: That's correct, Your Honor. There are
10 three more cases. Looking at my file here, I don't see that
11 I have copies of both verifications with me, so I would
12 offer, Your Honor, if the Court is willing, then I would
13 simply submit those later today for review.

14 THE COURT: Do you have the September -- what's
15 the second date? I just wonder if they have that same
16 September 4th.

17 MR. HULSE: Actually, I just don't know, Your
18 Honor.

19 THE COURT: All right.

20 MR. HULSE: We do think there's a pattern and
21 practice with this particular firm of this occurring, but,
22 again, if Your Honor is willing, we'll submit the other
23 three for the Court's review.

24 THE COURT: And that's just *Johnston*, *Billings*,
25 and *Edwards*?

1 MR. HULSE: Correct, Your Honor.

2 THE COURT: Okay. So that's fine. Mr. Lee also
3 represents *Collins*, 18-1175?

4 MR. HULSE: That's correct, Your Honor. This is a
5 different --

6 THE COURT: That's a different issue.

7 MR. HULSE: It's like *Weaver*.

8 THE COURT: Okay. Does anybody want to be heard
9 on *Collins*?

10 (No response)

11 THE COURT: *Collins* is dismissed. *Winegar*,
12 18-CV-1283?

13 MR. HULSE: That's also Mr. Lee's case, and it's
14 the same issue as *Collins*.

15 THE COURT: Right. Anybody want to say anything
16 about the *Winegar* case right now?

17 (No response)

18 THE COURT: Okay, *Winegar* is dismissed. And the
19 phones are back on mute because that "please hold" is still
20 going on. *Moore*, 17-CV-2901.

21 MR. HULSE: *Moore* is a case that's confusing to
22 us. Plaintiffs' counsel indicates that the plaintiff has
23 passed away, but at this point, no suggestion of death
24 substitution motion has been filed, and we've been unable to
25 locate any kind of obituary or death record for this

1 individual. That doesn't mean they haven't passed away, but
2 it just seemed to us at this point that there is not any
3 kind of proof of that, and so that's why we left it in the
4 motion.

5 THE COURT: And unlike the suggestion of death
6 cases, there was never a PFS even filed.

7 MR. HULSE: Correct, Your Honor.

8 MR. ASSAAD: That's my case, Your Honor.

9 THE COURT: Oh, it's your case. Okay, I was just
10 going to go back on the phone, and now I recall, Mr. Assaad,
11 that this is your case. So was there ever a PFS filed?

12 MR. ASSAAD: I don't believe so, Your Honor. The
13 issue is we heard or my office heard that the person passed
14 away, but we can't confirm it as well, so I want to file a
15 suggestion of death until I can confirm the death.

16 THE COURT: Okay. Well, then it's dismissed for
17 lack of PFS, and the person either is alive or dead, but
18 their case is no longer ongoing. Okay.

19 Let me, so we have a procedure that we talked
20 about for *Edwards* and *Johnston* and *Billings*. *Collins* is
21 dismissed. *Winegar* is dismissed. *Johnston*, *Hanks*,
22 *Lykes-Traver*, *Meyers*, *Shoaf*, *Hughes*, *Brown*, *Stidham* and
23 *Wiggins* are dismissed. And Mr. Walker may submit something
24 by the end of the day today on *Brabham*.

25 All right. Well, let's turn then to the

1 suggestion of death cases. The pretrial order number 23 and
2 the Federal Rules of Civil Procedure 25 cases.

3 MS. ZIMMERMAN: Your Honor, one piece of
4 housekeeping on the last set of motions, if we may just
5 request that the exhibits that have been provided in Court
6 today be made a Court exhibit.

7 THE COURT: Oh, good point. Okay, so now I've
8 given them back. So now you and Mr. Hulse make them joint
9 exhibits, and I'll receive them, and that way you can make
10 sure that the things that come in are the right ones that we
11 looked at.

12 MS. ZIMMERMAN: Thank you.

13 THE COURT: They'll be joint Exhibit 1 for the
14 October 18, 2018, hearing. And they'll be all three.
15 They'll include *Swales*, right?

16 MR. HULSE: Understood, Your Honor.

17 THE COURT: Okay. Are we ready to talk about
18 *Lister*, which is 17-4336.

19 MR. HULSE: Yes, Your Honor. This is a case that
20 the substitution motion was due more than three months ago.
21 It hasn't been filed. Plaintiffs' counsel indicate there is
22 no contact with the heirs, so under PT023 and Rule 25, this
23 case should be dismissed with prejudice.

24 THE COURT: Anybody want to say anything to the
25 contrary? And the phone lines are open. And no one in

1 court.

2 *Lister*, 17-CV-4336 is dismissed by operation.

3 Well, not by operation. It's dismissed under Rule 25 of the
4 Federal Rules of Civil Procedure.

5 16-CV-2631, *Rich v. 3M*. Let's talk first about
6 Mr. Rich and then we can turn to the consortium claim. So
7 we had a timely suggestion of death on April 3rd. Death
8 occurred January 6th. Mr. Hulse?

9 MR. HULSE: That's correct, and then so the
10 substitution motion was due more than three months ago. It
11 wasn't filed. The plaintiffs' actually filed a motion to
12 dismiss the entire case. They just asked that it be without
13 prejudice, and our request that Mr. Rich's claim be
14 dismissed with prejudice under Rule 25 and PTO23.

15 THE COURT: Anybody want to say anything about
16 that? All right. That's dismissed with prejudice. That's
17 *Rich* and, again, 2631, 16-2631.

18 What about the loss of consortium claim? It
19 strikes me that if in fact under Missouri law the consortium
20 claim can't proceed independently, that really would be a
21 12(b)(6), Rule 12 basis for dismissal, right?

22 MR. HULSE: That's right, Your Honor. I mean I
23 think what makes it easier is that plaintiffs themselves
24 have moved to dismiss their own case.

25 THE COURT: Okay. Well, but they moved to dismiss

1 it without prejudice.

2 MR. HULSE: Without prejudice, you're right. And,
3 Your Honor, we would have no issue I suppose with the
4 consortium claim being dismissed without prejudice. I don't
5 think it's going to make a difference at the end of the day,
6 which would be to simply --

7 THE COURT: Rule 12 is normally without prejudice,
8 but there's no way -- does anybody think that Missouri law,
9 and I know that New Jersey was first cited along with it,
10 but I think we are under Missouri law for this case.

11 If it's derivative, there's no point having it be
12 without prejudice because without his claim, there is no her
13 claim. Okay. So that case is dismissed in its entirety,
14 which is to say both plaintiffs.

15 All right. *Richey*, 17-CV-5323.

16 MR. HULSE: So this is a case where the suggestion
17 of death was filed late, and now there's another deadline
18 missed, which is the substitution deadline. No substitution
19 has been filed. It was due earlier this month.

20 There has been no showing of impossibility of
21 compliance with the PTO23 deadline on suggestions of death.
22 No good cause shown for missing the substitution deadline,
23 so we ask that this case be dismissed with prejudice.

24 MR. ASSAAD: Your Honor?

25 THE COURT: Mr. Assaad.

1 MR. ASSAAD: Before I talk about this case, the
2 plaintiffs have filed a Motion to Amend, PTO Rule 23 on the
3 suggestion of death I'd like to be heard on at this point
4 because I think a lot of the arguments I make there will
5 also apply to a couple of the cases that --

6 THE COURT: Well, even if you win that, it's not
7 going to be retroactive. So what do you have to say about
8 *Richey*?

9 MR. ASSAAD: Well, in the *Richey* case, we missed
10 the deadline because we weren't aware of the death until
11 July 3rd. Once we found out about the death on July 3rd, we
12 filed it. There is no -- it's very hard for the plaintiff
13 to discover deaths of clients. We don't call our clients to
14 ask them, "are you still alive?"

15 THE COURT: Okay, that is an argument that you're
16 going to want to make in the more broad context. Here's
17 what I'm going to do on *Richey*. It's not really what you're
18 talking about, but I'm going to deny the defendant's motion
19 not having to do with anything you are talking about.

20 But it struck me reading through the materials
21 that Mr. Assaad, you've been given the wrong information
22 about the death date, and that's something different from
23 just not knowing or not knowing the date, not knowing the
24 person's dead. So you got caught by a three-day difference
25 for filing the suggestion of death.

1 So it's not technically all right under the order,
2 but because you were operating not just in the dark, but you
3 thought you had the right information. You didn't have the
4 right information, so the motion is denied, and I give you
5 30 days to file a proper substitution motion. So 30 days
6 from today, I'll get a substitution motion in. And if
7 that's not in, then *Richey* will be dismissed with prejudice,
8 but that's what we're going to do on that one.

9 MR. ASSAAD: Thank you, Your Honor.

10 THE COURT: *Bellande*, and 16-CV-2700.

11 MR. HULSE: The much briefed *Bellande*, Your Honor,
12 this is a case where the Court gave plaintiffs' counsel a
13 week to demonstrate that compliance with Court's Order with
14 PT023. That deadline was impossible, as the plaintiffs had
15 represented.

16 What they indicated in their supplemental
17 submission is that they made a phone call to the *Bellande*
18 household in January of this year. It went unanswered.
19 They didn't then followup again until April. They learned
20 that Mr. *Bellande* was dead and then two month later, they
21 filed a suggestion of death.

22 Our view is that doesn't demonstrate
23 impossibility. If you don't reach somebody by phone, that's
24 a pretty good indication that you should try them again,
25 certainly not wait three months and then wait another two

1 months to file the suggestion of death. So we don't believe
2 the Court's criterion has been met.

3 THE COURT: Okay. Mr. Assaad, do you want to come
4 up to the podium and speak?

5 MR. ASSAAD: Yes, Your Honor.

6 THE COURT: Or do you want to stay where you are?
7 It's up to you.

8 MR. ASSAAD: And I'll try to be brief, Your Honor.
9 But as we can see, there are numerous motions being filed
10 under PTO23 regarding the 90-day limit for suggestion of
11 death. And let's be clear, the 90-day limit is a court
12 imposed 90-day. It's nowhere in the Federal Rules of Civil
13 Procedure.

14 THE COURT: I'm talking right now about the
15 *Bellande* case.

16 MR. ASSAAD: I'm sorry. I thought you wanted me
17 to talk. It's the same thing, Your Honor. It is --

18 THE COURT: It's not exactly the same thing
19 because we've discussed *Bellande*, and I gave you time to
20 submit things. So *Bellande*, I don't think it should be
21 impossible to address the *Bellande* case.

22 MR. ASSAAD: I understand that. We called the
23 client. They did not pick up the phone. Judicial notice
24 that people do not pick up phones. We tried back a couple
25 months later.

1 THE COURT: Well, it was a couple of months. It
2 was quite a bit. It was April. So January -- wait a
3 second. Oh, I can't remember. I had this all in my mind.
4 It was, I thought the call, the initial call was --

5 MR. ASSAAD: January 26th.

6 THE COURT: And no call back until -- so three
7 months. Did you call back in April?

8 MR. ASSAAD: April 17, 2018, Your Honor.

9 THE COURT: Okay.

10 MR. ASSAAD: Two months or three months in an MDL
11 case to call the client, which as you're aware, there's
12 5,000 cases. We have many cases, Your Honor. Nothing is
13 really happening on most of these cases. We have no reason
14 to call the client. We contact them with e-mails and
15 letters giving them updates every couple of months. We only
16 contact a client if we're returning a phone call or calling
17 them to get some information. Two months or three months
18 between calls is not irregular.

19 THE COURT: You just keep saying "two or three
20 months." Am I wrong about these dates?

21 MR. ASSAAD: Three months, three months, Your
22 Honor, a little less than three months. You know, less than
23 three months we find out after the first call that they
24 didn't pick up that the person was deceased, Your Honor.
25 My point is there is no intentional disregard of the Court's

1 Order here, Your Honor. There's no reason that the
2 plaintiffs should be basically sanctioned for involuntary
3 dismissal based on not following a rule, which we think is
4 impossible to follow, and that's why we brought up the
5 Motion to Amend.

6 There's no other court in this country that has
7 ever dismissed a case on a failure to file a suggestion of
8 death under timely. No court in this country. The one case
9 that they cite to that has been posed an order of 30 or 60
10 days for suggestion of death, to me that was dicta because
11 if you go look at the cases, they never denied a suggestion
12 of death and even some of them were filed 900 or 900 days
13 after the death of the plaintiff in those cases.

14 THE COURT: Is there not a loss of consortium
15 claim in *Bellande*? So you had a live plaintiff the whole
16 time and, of course, under Rule 25, it doesn't have to be
17 counsel. It can be somebody in the family who files the
18 notice of death, right?

19 MR. ASSAAD: We're talking about the suggestion of
20 death. And most of these people that we represent don't
21 understand the Rules of Civil Procedure that they have to
22 notify and file a suggestion of death when their loved one
23 or their father dies or their mother dies.

24 THE COURT: Right. But the impossibility argument
25 that you're talking about has less weight when the spouse is

1 alive and is also a plaintiff and would presumably have some
2 interest in -- knows for certain knows that there's a
3 lawsuit going on.

4 MR. ASSAAD: Is it impossible? Probably not. Is
5 it unreasonably an undue burden on plaintiffs' counsel to
6 make sure that their clients are all living and have 90 days
7 to keep on contacting them if they don't pick up the phone?
8 When I call people, and they don't pick up the phone, I
9 don't assume they're dead, Your Honor.

10 And we should not have to assume on January 26,
11 2018, that when we left a message and we don't get a call
12 back, we tried back two and a half months later, that the
13 plaintiff is dead. That is where the impossibility is to
14 put a burden on the plaintiffs' counsel to figure out that
15 within 90 days of the death of a plaintiff that the person
16 is dead and files a suggestion of death.

17 No court in this country has ever dismissed a case
18 on solely on the grounds of the suggestion of death not
19 being filed timely. And in the *Novartis* case out of
20 Tennessee, which counsel has cited, every single one of the
21 suggestion of death and motions to substitute were granted
22 even when they're filed almost three years after the death
23 of the decedent. Dismissing a case under Rule 25 or
24 basically dismissing it under PTO23 is a Rule 31 dismissal,
25 and the Eighth Circuit discourages, highly discourages

1 dismissals that are not based on the merits. And the fact
2 that we were a little bit late or anyone is late in this
3 case filing a suggestion of death, especially when there's
4 no prejudice. These cases are just sitting there --

5 THE COURT: All right. Once again, please, not
6 "these cases." In the *Bellande* case, did you not wait more
7 than two months even after? So you call on January, you
8 don't get an answer. You don't call back until April. You
9 find out about the death. You then wait two months, and so
10 to file the suggestion of death.

11 So even if it's, you know, you maintain that it
12 was impossible, even though you had a live plaintiff living
13 in the same house to know about the death, then is it your
14 position that because that deadline was impossible to meet,
15 that then it didn't matter when you file? I mean the two
16 months of waiting after you found out is concerning. I
17 don't understand how that, and you don't talk about that in
18 your *Bellande* papers, I don't think.

19 But the suggestion of death didn't get filed until
20 June 15 of 2018, so we've got two months that go by
21 following the belated learning of the death to file the
22 suggestion of death.

23 MR. ASSAAD: I'm just trying to get the date of
24 our filing.

25 THE COURT: Yes, just make sure that's right

1 because I think it's ECF number 6-16-CV-2700.

2 MR. ASSAAD: We filed on June 15, 2018, Your
3 Honor.

4 THE COURT: So two months after you finally
5 learned of the passing on April 17th.

6 MR. ASSAAD: I understand that, Your Honor, and I
7 understand your position. However, my argument is still
8 this dismissal will be a very harsh sanction for someone
9 that is injured without any prejudice at all to the defense
10 in this case.

11 This client is not a bellwether. There's no other
12 issues with, I mean there's no hardship to the defendant in
13 this case. And I think under any type of dismissal, at this
14 point in time, without any prejudice, it just would be
15 unfair, and I think would go against what the Eighth Circuit
16 would consider a harsh sanction for not, you know, not
17 filing something timely two months later, Your Honor.

18 THE COURT: All right. *Bellande* is dismissed.
19 The matter was previously discussed at a conference. An
20 opportunity was given to show why it would have been
21 impossible. The showing does not demonstrate impossibility.
22 There is the spouse. There's the existence of PT023, which
23 is a reason to set up a system to maintain sufficient
24 contact with clients to make sure that they're still alive.
25 The waiting after belated learning even of the death for two

1 months to file is not reasonable.

2 The existence of PT023 is justifiable. It is a
3 mechanism that was discussed in great detail before it went
4 into effect. Before we had it, defendants were having to go
5 through what plaintiffs were alive and which ones weren't.
6 We had 20 or so motions filed by the defendant to dismiss
7 because of death.

8 And the tardy filings aren't necessarily, you
9 know, it doesn't have to be a whole bad faith finding, but
10 there's been a clear Order. I know that, Mr. Assaad, you've
11 opposed that Order for a long time, but it couldn't be more
12 clear that the Order is in effect, and it's there to make
13 sure that we know that some percentage of these five
14 thousand or so cases to try to keep track of how many of
15 those are cases that have a live plaintiff. So the *Bellande*
16 case is dismissed.

17 We now have the broader question of whether PT023
18 should be amended. And, Mr. Assaad, I think you've made the
19 points in connection, you've made your argument. Is there
20 anything else you want to say now generally in support of
21 your position that the 90-day deadline per suggestion of
22 death ought to be eliminated?

23 MR. ASSAAD: Yes, Your Honor. Rule 25 was amended
24 in 1963, and the advisory committee in the 1963 amendment
25 stated that it was intended the motion to be substituted to

1 be freely given, and it may be denied by the Court with the
2 exercise of sound discretion if made long after death and
3 circumstances arising rendering it unfair to allow
4 substitution.

5 This Court has imposed a deadline based on the
6 request by the defendants in which the plaintiffs did oppose
7 and that we were not allowed to brief on earlier. It was
8 part of the joint agenda, and we never had the opportunity
9 to brief it. And, therefore, we briefed it in our Motion to
10 Amend.

11 Now, what we do know is the Federal Rules of Civil
12 Procedure do require 90 days after the suggestion of death,
13 which can be extended by good cause under Rule 6B, and it
14 can be filed by any party. It doesn't have to be the
15 plaintiff or the defendant. Now, the Eighth Circuit has
16 said that the power of this Court to dismiss a cause of
17 action with prejudice is not unlimited. Dismissal with
18 prejudice are drastic and extremely harsh sanctions. And
19 this is *Bergstrom v. Frascone*, 744 F.3d 571. A dismissal
20 not on the merits but failure to meet a deadline imposed by
21 the Court is a sanction, and sanctions must be proportionate
22 to a litigant's transgression.

23 The Eighth Circuit has stated that dismissal with
24 prejudice is proper only when there has been a clear record
25 of delay and contentious conduct by the plaintiff. The

1 Eighth Circuit has also admonished that this sanction should
2 only be used when lesser sanctions prove futile. Dismissing
3 these cases for the failure of filing a suggestion of death
4 is a sanction on the plaintiff that's not based on any type
5 of merits.

6 No court, as I said before, has ever enforced a
7 deadline to file the suggestion of death. And defense cited
8 to the *Novartis* case, which is *In Re Aredia and Zometa*
9 *Products Liability litigation*. They used that case when
10 they argued for the 30 day, when they wanted 30 days, and
11 then they cite it again in the opposition to the Motion to
12 Amend.

13 And from the get-go, the plaintiffs' position is
14 that's just not fair that we have to find out that we have
15 to call our clients in an MDL case when nothing is going on
16 in their case, they filled out the PFS. We have nothing to
17 tell them. Nothing has happened in this case in this Court
18 for, you know, since the trial. Nothing significant that
19 the clients need to know about. And we send them letters.
20 And, of course, that people do not call us, and they don't
21 answer phone calls, and they don't say we didn't get the
22 letter.

23 So I looked at the *Novartis* case that defendants
24 cited, and it is in the Order but that Order was never
25 enforced. It was never enforced. It was basically dicta.

1 And I created a spreadsheet that I would like to give to the
2 Court that has the case numbers, and I did 150 of the 300
3 suggestions of death, and all of them were granted. All of
4 the motions to substitute were granted even after it was
5 filed after the 60-day deadline because dismissing --

6 THE COURT: Just a second. I haven't said I would
7 receive it yet. I just want to know first what it is.

8 MR. ASSAAD: It is a list of all the cases in
9 which a court, the Court in that case, the District Court in
10 Tennessee, which had the only order that the defendants
11 could fine imposing a deadline for the suggestion of death
12 of when the person died, when the suggestion of death was
13 filed.

14 THE COURT: Okay, what's the Tennessee court?
15 What's the Tennessee case?

16 MR. ASSAAD: It is *In Re Aredia and Zometa*
17 *Products Liability Litigation*.

18 THE COURT: That is A-r-e-d-i-a.

19 MR. ASSAAD: Yes, Your Honor.

20 THE COURT: And Z-o-m-e-t-a. So what did you do?
21 What is this? You went through the docket in *Aredia*?

22 MR. ASSAAD: Yes, I did. And what I did was
23 60 days just is impossible for people to find out their
24 clients have died at 60 days.

25 THE COURT: But that was 30 day.

1 MR. ASSAAD: It was a 30 day, then it changed to
2 60, and I think they changed it later on, but the point is
3 that every single case that the suggestion of death was
4 filed after the deadline was still granted, and the motion
5 to substitute was granted. And as far out as 921 days after
6 the death of the plaintiff, the Court still granted it
7 because it would be unfair and harsh and would go against
8 the clear law in the Eighth Circuit or any circuit because
9 there are many cases out there to dismiss a case when a case
10 has merit.

11 And that's why we believe the 90-day rule should
12 be changed to something more reasonable. If they find out
13 that we knew about the death and failed to inform them in a
14 timely manner, that should be the appropriate standard.

15 However, to have set a hard standard to impose on
16 plaintiffs' counsel to determine when someone dies because
17 they might not have answered a phone call and not returned
18 our phone call, which I have a lot of friends that don't
19 return my phone call. I don't assume that they're dead.
20 That's very harsh, and I think it goes against the great
21 weight of the law in the Eighth Circuit.

22 THE COURT: Do you have a similar analysis of
23 *Wallace v. Novartis* in Pennsylvania?

24 MR. ASSAAD: Yes, it was dismissed on Rule 25
25 based on the fact that, if I recall correctly in that case,

1 the person that they said was the administrator on the
2 motion to substitute was not really the administrator,
3 wasn't legally the administrator or the personal
4 representative of the case. No case has been dismissed for
5 failure to file a timely suggestion of death. Many MDLs go
6 on in this case, and most of these types of orders are not
7 in those MDLs.

8 Number one, there has to be a prejudice to the
9 defendant. Nothing is going on in these cases until maybe
10 when they get remanded, and I think the District of
11 Tennessee, one case they dismissed because part of the
12 remand order was you had to submit all of the certificates
13 of like the administrator certificates or whatever they're
14 called in each state to the defense counsel and they failed
15 to do it. Not one case was dismissed for failure to file
16 suggestion of death because it is unreasonable.

17 These people are real people. They have cases.
18 And the fact that no one knew that they died or someone
19 didn't contact them in an MDL is unfair, and it goes against
20 what the Eighth Circuit and every other circuit. Even the
21 Third Circuit case, the *Brown* case, where the suggestion of
22 death -- interesting enough about all of these cases, Your
23 Honor, the knowledge of death, we can know the knowledge,
24 but the 90 day does not trigger until the suggestion of
25 death is filed.

1 THE COURT: Rule 25.

2 MR. ASSAAD: Your Honor?

3 THE COURT: Rule 25 doesn't apply until --

4 MR. ASSAAD: Yes, even if everyone knows the
5 person is dead. In the Third Circuit, *Brown versus* -- I'm
6 sorry, I'll pull up the case. This is a case in which --
7 well, the *McKenna* case, which I cited in my brief.

8 THE COURT: What's the cite?

9 MR. ASSAAD: *McKenna v. Pacific Rail*.

10 THE COURT: So is that not the *Brown* case?

11 MR. ASSAAD: No, 32 F.3d 820. And this is a case
12 in which, this is a Third Circuit case in which all the
13 parties knew the person was dead. On the day of trial,
14 there was no suggestion of death and no motion to
15 substitute, and the District Court dismissed the plaintiff.
16 And the Third Circuit reversed and basically said that until
17 the suggestion of death is filed, which it was very late.
18 It was the day before trial, but that is not grounds to
19 dismiss a meritorious claim.

20 And what 3M is doing here is using Rule 23 as a
21 sword to dismiss meritorious claims because of the failure
22 to file a suggestion of death, which no court in this
23 country has ever dismissed a case on, Your Honor. And I
24 think there should be a new system that I would like to get
25 together with defense counsel and maybe propose something

1 more reasonable of maybe 30 days from the knowledge of death
2 by plaintiffs' counsel.

3 But to impose, I mean I might have clients that I
4 don't know have died, and there's no way I'm going to find
5 out. There is no service out there, Westlaw or Lexis, that
6 you can plug in names and find out if a person is alive or
7 dead. And when we talked about an earlier case that we
8 dismissed about under PTO-14 that both sides tried to find
9 out if the person is dead or not, we heard rumors, but no
10 one could conclude that someone was dead. It's very hard to
11 do.

12 And we had these motions that just, I think, waste
13 the Court's time on issues that could be resolved later on,
14 and we don't have to sit here and argue did you know or not
15 know? If we find out, we'll let the defense know. We'll
16 file a suggestion of death. If not, the plaintiffs should
17 not be -- their meritorious claims, these injured plaintiffs
18 should not be cases dismissed because I don't think the
19 sanction is proportionate to the failure to file suggestion
20 of death within 90 days.

21 THE COURT: Okay. Could you just briefly address
22 the utility of a procedure that sort of minimizes the
23 chances that an MDL is populated with deceased plaintiffs?
24 In terms of the defendants or anybody knowing what the
25 actual number of cases is?

1 MR. ASSAAD: Well, we're talking about a small
2 handful here, Your Honor. And I think the most important
3 part of what the MDL process does is it sets up a system for
4 discovery, and usually if these plaintiffs are dying during
5 the plaintiff fact sheet process, usually those are
6 discovered because there's communications with the plaintiff
7 to get answers and discovery. So most of these cases are
8 coming up after the PFS is completed.

9 And, realistically, Your Honor, it's not a single
10 event case. Usually I'll have contact with my clients on a
11 single event case. Cases that I have appeals on, you know,
12 I might not contact the client from the date of filing an
13 appeal to let them know that the appeal is being heard.
14 There's just nothing to talk to the client about. We don't
15 call our clients. No one calls their clients to make sure
16 they're alive.

17 THE COURT: But just in terms of the willful
18 disobedience of the rule that you disagree with, PTO23, to
19 not make a, to not set up some system even if you don't call
20 them personally, to have some regular communication enough
21 to know that they're alive or dead, I mean how, like, what
22 have you done to comply with Rule 23?

23 MR. ASSAAD: You know, we've sent out, we sent out
24 letters, we send out e-mails to update them about the case.
25 You know, we try to contact our clients, but if they don't

1 pick up the phone, we just can't assume they're dead. If I
2 picked up the phone of every client --

3 THE COURT: So we've got this order on the books,
4 so you call, there's no answer and then --

5 MR. ASSAAD: Well, I don't think we need at this
6 point in time to even dismiss cases of --

7 THE COURT: I'm just asking what you do and the
8 answer is?

9 MR. ASSAAD: I have my office send letters. If we
10 get a bounce-back or something like that, then I'm like,
11 hmm, you know, this is unreturnable. Let me follow up. But
12 sometimes, you know, they're living somewhere where they
13 don't bounce back the letters. The letters don't come back
14 to us.

15 You know, it would be very inefficient to send
16 letters by Fed Ex to get them signed every time I send a
17 letter to my client. I think that would be an unreasonable
18 burden on the plaintiffs to do. But I think the real
19 solution here is just what's the harm of letting it go? I
20 mean so instead of having 4900 cases, we have 4800 cases,
21 and a hundred people that are dead. If these cases get
22 remanded or there's a resolution, it will be discovered at
23 that time. It will be discovered at that time.

24 But at this point having these motions and arguing
25 these motions over an Order, which no court has ever

1 followed, which we're dismissing cases, a meritorious case
2 on the fact that we didn't file a suggestion of death within
3 90 days, I don't think that abides by the Eighth Circuit or
4 any circuit's law on dismissing cases under Rule 41. And I
5 do think it's reversible error, Your Honor, under Rule 41
6 because --

7 THE COURT: All right. Thank you, Mr. Assaad.
8 Mr. Hulse?

9 MR. HULSE: Your Honors, just a couple of things I
10 want to say. PTO23 is actually working very well. We've
11 had very few cases that we've had to move to dismiss over
12 the last ten months because of noncompliance, a relatively
13 small subset of them are suggestion of death cases. Every
14 day we see suggestions of death being filed. We get
15 reach-outs from plaintiffs' counsel about substitution
16 motions to meet and confer.

17 So the process from our perspective has actually
18 worked quite well, and it's addressed what, from our
19 perspective, was a very serious problem that existed in the
20 MDL, which is that we had an ever growing number, dozens of
21 cases, and that's just what we knew about at the time, of
22 cases where plaintiffs had passed away and nothing had been
23 done.

24 And the reason that we're also surprised about the
25 position that's being taken here is it really is in

1 everybody's interest to have a system that ensures that
2 there is regular communication with plaintiffs' counsel,
3 that deaths are identified, and action is taken.

4 Many states, many states have very short statutes
5 of limitation on survival actions, and you have to bring
6 that survival action on behalf of the deceased plaintiff
7 within a year. If there's no contact being had, there's no
8 discovery of the death, that year can easily lapse. As it
9 is, the process that PTO23 puts in place is a six-month
10 process.

11 So our viewpoint is it's working well. The
12 relatively small number of motions that have had to be filed
13 and taken up by the Court is proof of it. The very
14 significant number of timely suggestions of death that have
15 been filed is proof of it as well.

16 We don't see this as a widespread problem. This
17 is just our perspective for plaintiffs' counsel in the MDL.
18 There are other firms that have, including the Brown and
19 Crouppen firm, which has about a quarter of the firms in the
20 MDL. They've got over 1200 I think, at this point, that has
21 had from our perspective we've seen very little issue in
22 terms of getting suggestions of death on file.

23 Now, I don't know what they do, but it strikes us
24 that probably what's happening is that most plaintiffs'
25 counsel after PTO23 was adopted put into effect some kind of

1 system where they were informing their clients of the
2 obligations under PT023. They have information about next
3 of kin through the PFS process where next of kin have to be
4 identified and that there was real and good work being done
5 by many plaintiffs' counsel to ensure compliance, and it's
6 working. And as a result, we are no longer put in the
7 position of constantly searching obituaries and social
8 security death records to figure out who is alive and who is
9 dead.

10 The one thing I would add the backdrop to PT023 is
11 that we tried for months to reach an agreement with
12 plaintiffs' counsel on a system where they would be
13 monitoring for deaths and would disclose it to us, and we
14 were not and plaintiffs' liaison counsel simply was not able
15 to get meaningful participation by many of the plaintiffs'
16 firms, and that's why we came to the Court asking for a
17 Court Order.

18 The 90-day deadline is within the range. In fact,
19 it's longer than some of the deadlines that have been
20 adopted by other courts. *Aredia and Zometa* did go up to 60
21 days because 30 days, ultimately, the Court concluded that
22 that might be too short, that 60 days was the date, and
23 then, of course, we had the 60 day deadline in *Wallace v.*
24 *Novartis*. This deadline is well within the Court's
25 authority under Rule 16 to set deadlines in the case. It's

1 vital in the management of an MDL.

2 The argument that we should treat plaintiffs
3 differently. We should treat the obligations of
4 communication differently in an MDL where we have five
5 thousand cases I think is exactly the wrong way of
6 approaching it. The idea this is not a class action. These
7 are not absent class members. They are real plaintiffs.
8 They deserve to be in regular contact. They have the rights
9 of their heirs need to be protected. And everybody in here,
10 if we're going to talk about how we work through these five
11 thousand cases, we have to know who is alive, who is dead,
12 who the real plaintiffs are, and get substitutions done in a
13 timely manner.

14 So beyond that, unless Your Honors have questions,
15 we stand on our briefs.

16 THE COURT: Okay. Thank you, Mr. Hulse.

17 MR. HULSE: Your Honor, just briefly, we did have
18 another PTO23 motion just with three cases that was noticed
19 for today. I don't know if the Court is ready to hear it.

20 THE COURT: Well, first, I was going to see if Mr.
21 Assaad had any response so.

22 MR. HULSE: Oh, of course.

23 MR. ASSAAD: Your Honor, I don't disagree that at
24 the end of the day we need to know what cases are in and
25 what cases are out. I just disagree with the harshness of

1 the penalty by people that don't find out within 90 days
2 that their clients have passed away and not filed a
3 suggestion of death.

4 And a couple of things, the *Wallace* case is also
5 the same thing as the first MDL I discussed In Re Aredia and
6 Zometa. It just was the case was all remanded, and it was
7 just tried in Pennsylvania. That's why that came up. It
8 was the same order. It wasn't two different courts having
9 two different orders. The only court that ever ordered the
10 90 days is that one court.

11 THE COURT: It was 60 days.

12 MR. ASSAAD: Or 60 days, I'm sorry. And with
13 respect to the survival action, the SOL, that's not an issue
14 in this case. These cases already have been filed, so
15 there's no SOL on a motion to substitute. And, in fact, the
16 advisory committee says it could be filed long after the
17 person's death. That's all I have, Your Honor.

18 THE COURT: So with respect to Rule 25 says
19 90 days or a court dismiss. PTO23, as we have seen, if
20 there is some representation of diligent efforts to reach a
21 client and, you know, an explanation for where you sent
22 this, we tried this, we did this, then that time is
23 extended.

24 I'll take a look at, Mr. Assaad, the new -- well,
25 the arguments that you've made here today, and I'll take a

1 look at the motion.

2 MR. ASSAAD: Your Honor, I forgot to submit the
3 spreadsheet that I made.

4 THE COURT: Yeah.

5 MR. ASSAAD: It might be helpful.

6 THE COURT: Well, it's your reading of the docket
7 sheet in a separate unrelated MDL for the purpose of showing
8 that this Court would be out of step with the Tennessee
9 court.

10 MR. ASSAAD: No, it's to show that the Tennessee
11 court did not even follow their own Order, but they did and
12 understood that they're granting orders to substitute well
13 after the death.

14 THE COURT: Yeah, it seems totally irrelevant, but
15 I'll receive it.

16 Okay. Mr. Hulse, you had something you were about
17 to say.

18 MR. HULSE: Your Honor, there was one more PT023
19 motion with three cases that we had noticed for today. We
20 can hold it over to next time, if the Court prefers.

21 THE COURT: Wait a minute. Let me just see here.

22 MR. HULSE: The cases are *Williams*, *Kriner* and
23 *O'Conner*.

24 THE COURT: Yes. So I've read through, *Williams*
25 is kind of -- *Williams* is sort of a funny one, right?

1 MR. HULSE: Yes.

2 THE COURT: Let me hear from the plaintiffs on
3 *Williams*, because that was a -- isn't that the one where
4 there was this odd motion filed, but it was the wrong motion
5 that was filed?

6 MR. HULSE: That's right, Your Honor. So I can
7 let them speak for themselves, Your Honor. It's Mr. Walker.

8 THE COURT: Who has got *Williams*, 17-CV-264.

9 MS. ZIMMERMAN: Mr. Travis Walker, so he's on the
10 telephone.

11 THE COURT: Oh, right, right. Mr. Walker?

12 MR. WALKER: Are you there? Can you hear me, Your
13 Honor?

14 THE COURT: Yes.

15 MR. WALKER: Okay, perfect. Just with a little
16 bit procedural background, in January of 2017, we filed a
17 Complaint. On February 7 of 2018, Mr. Williams, Millard
18 Williams passed away. On May 1 of 2018, we filed a notice
19 of death, so --

20 THE COURT: Right, a timely notice of -- a timely
21 suggestion of death.

22 MR. WALKER: Yes, Your Honor. And so on May 7th,
23 we filed our motion to substitute, which was also timely.
24 On June 4th, 2018, Magistrate Judge Noel declined to enter
25 an Order. We needed to do a meet and confer, and we agreed

1 with that.

2 And then on June 6th, our office was in contact
3 with Ted Hartman, opposing counsel, with the meet and
4 confer. At that point, we determined that we needed,
5 pursuant to Arkansas law, we needed to do a probate action,
6 and we agreed with that. As opposed to amending the motion,
7 which was already timely, the motion was withdrawn.

8 And then on July 23, 2018, our office e-mailed
9 Mr. Hartman again asking for additional time to conduct a
10 probate. Our client is 74 years old. She's had a stroke.
11 She is in rural Arkansas, so it's difficult for her to get
12 access to the courts.

13 THE COURT: Right.

14 MR. WALKER: So we received no response to that
15 July 23, 2018 e-mail. On September 6th, we re-filed the
16 motion to substitute. And on September 12th, the response
17 was received in opposition as the proper party was not the
18 executor and does not indicate that -- did not indicate the
19 previous, in their response, they said nothing that
20 obviously the previous motion had been timely.

21 So we filed a response for defendant's opposition
22 motion to substitute on October 11th. Right now, the client
23 is completely in position to be -- she's got the letters of
24 administration. She's now the executor of the estate.
25 She's completely in position to be the plaintiff, but for,

1 and we've been doing our due diligence. We've been
2 constantly in contact trying to work the probate and
3 everything and act expeditiously and really there's no
4 material delay, you know.

5 And, you know, and as you heard dismissal with
6 prejudice, you know, is an extreme sanction, and we cited
7 that in our motion. You know, and everything is in place
8 now. You know, the plaintiffs have been properly pointed,
9 and so we've been constantly working the file over, and
10 we're just asking that the Court, you know, considering that
11 the notice of death was timely filed and the defendants were
12 well aware of what was going on, we asked for Ms. Williams
13 to be substituted.

14 THE COURT: And when you filed on September 6th,
15 you accidentally filed the same thing that you had filed
16 before, correct?

17 MR. WALKER: Correct, Your Honor. We have made a
18 mistake. We filed the same motion and then that's why we
19 filed the amended motion subsequently.

20 THE COURT: Right. I looked into this, and I feel
21 your pain. I see that she was appointed on September 5th,
22 right?

23 MR. WALKER: Yes. So she was appointed on
24 September 5th, and we filed the motion to substitute on
25 September 6th.

1 THE COURT: Right, and you filed the wrong thing,
2 but I, you know, so she's appointed on September 5th.
3 September 6th, you file something. It's accidentally the
4 wrong thing, and she's all set to go now. I accept that
5 what you meant to file the day after she was appointed was
6 something having to do with the fact that she just got
7 appointed. So the motion to dismiss *Williams*, 17-264, is
8 denied.

9 MR. WALKER: Thank you, Your Honor.

10 THE COURT: All right. The speaker is off now.
11 *Kriner*, 16-CV-169.

12 MR. HULSE: In this case, plaintiffs' counsel
13 filed a letter indicating that they lost contact with
14 anybody, any heirs. They didn't file an opposition.

15 THE COURT: And *Kriner* is dismissed. That once
16 again is 16-CV-169. Dismissed.

17 *O'Conner*, 17-CV-1317.

18 MR. HULSE: No opposition filed, Your Honor, and
19 there's been no demonstration of impossibility of
20 compliance.

21 THE COURT: And *O'Conner* is dismissed.

22 MR. HULSE: Thank you, Your Honor.

23 THE COURT: Mr. Hulse, let me ask you, we've now
24 covered every plaintiff who is the subject of a motion today
25 from one of your motions, right?

1 MR. HULSE: Yes, Your Honor.

2 THE COURT: Okay. Thank you for reminding me
3 about that three. I forgot those three.

4 And we have heard about the Motion to Amend, 23.
5 We've got your 15th motion to dismiss for failure to comply
6 with PTO-14.

7 MR. HULSE: Right, that was the PFS motion, Your
8 Honor.

9 THE COURT: Okay, so we did that. Those are the
10 same cases. Okay. We've done it.

11 So, that brings us to bellwethers, pretrial orders
12 and case schedule. The first matter on the correct joint
13 agenda.

14 There was an objection to the Magistrate Judge's
15 R&R in *Axline*, and there has not yet been a response to
16 that, but because this is the end of October, I took a look
17 at the R&R and the objections anyway. And I am persuaded
18 that the R&R is correct, and I will adopt that Report and
19 Recommendation.

20 There are two cases remaining in that pool for the
21 bellwether second, and those are *Ramirez* and *Henderson*.
22 Ms. Zimmerman, you're dismissing those; is that right?

23 MS. ZIMMERMAN: That is not quite right, Your
24 Honor.

25 THE COURT: Not quite right. Okay, set me

1 straight.

2 MS. ZIMMERMAN: So there are more than just two
3 cases left in that bellwether group, but the two that are
4 listed, *Ramirez* and *Henderson*.

5 THE COURT: Oh, the two of them.

6 MS. ZIMMERMAN: Two of them, exactly, that's
7 correct, Your Honor. And I believe that counsel for both of
8 those cases I believe is Brown and Crouppen firm in
9 Missouri, and they have approached counsel for 3M with
10 respect to their intention to dismiss those cases *Ramirez*
11 and *Henderson*.

12 THE COURT: But we still have more.

13 MS. ZIMMERMAN: Yes. And we have, I believe
14 *Partlow* is one that remains. *Trombley* is another one that
15 remains. *Arnold* I believe is another that remains. And I
16 think it was *Axline*.

17 THE COURT: I'm sorry, Jerry?

18 MR. BLACKWELL: *Goodpaster*.

19 MS. ZIMMERMAN: Oh, *Goodpaster* as well. Thank
20 you, Mr. Blackwell. So those are the remaining cases from
21 the second bellwether order. And though there are some
22 other issues that are probably going to overlap given some
23 of the decisions from this Court. I know, for example, Ohio
24 comes up again, so there's a number of different issues that
25 we may need to get the Court's input on.

1 THE COURT: What do you think, Ms. Zimmerman,
2 about the idea of supplementing the bellwether pool?

3 MS. ZIMMERMAN: Your Honor, the plaintiffs'
4 position is that it would be more useful to the Court and
5 the parties that we would learn more if we really focused
6 our attention on two issues, and those are really kind of
7 addressing the post-trial motions in *Gareis*, so that we can
8 get the evidentiary and other kind of issues sorted out by
9 the Eighth Circuit. And then perhaps meeting with Judge
10 Schultz with respect to the bucketizing idea that he
11 suggested. I don't know if that's a real word, but it's a
12 word now.

13 THE COURT: It's going be on your tombstone.

14 MAGISTRATE SCHULTZ: I'm going to be bucketized.

15 MS. ZIMMERMAN: So just from our perspective, we
16 think that that would be the most productive use of the
17 Court's time and the parties' time. There's a lot, I guess,
18 if we continue to try the same case, I don't know how much
19 we're going to learn from that, so that would be our
20 position that if we could focus on getting those post-trial
21 motions kind of figured out and see what the Eighth Circuit
22 has to say about them, and chat with the Judge when he's
23 available, we think that that would be the most efficient
24 use of everyone's time.

25 THE COURT: Would that still be your view if you

1 didn't get a stay? If we just waited until the *Gareis*
2 post-trial motions, I could issue an order on those, but in
3 the absence of a stay, would you still think that we don't
4 need to address the bellwether pool right now? Well, not
5 right now, but are you --

6 MS. ZIMMERMAN: To repopulate it, whether there's
7 a stay or not?

8 THE COURT: Right, right.

9 MS. ZIMMERMAN: I think that some of these issues
10 that I just briefly forecasted, I mean I think of the four
11 remaining cases, we do have another Ohio case. And so if
12 we're not going to be permitted to amend that Complaint to
13 conform to the Ohio Products Liability --

14 THE COURT: So now we're down to three.

15 MS. ZIMMERMAN: Yes, exactly. I don't know enough
16 about each of those cases as I stand here, so I would be
17 happy to get additional information to provide to the Court
18 what might be gained from those, but I do think that we're
19 going to run into some of the same issues both with respect
20 to amending and choice of law and that sort of thing.

21 THE COURT: All right. Thank you. One more
22 thing, do you have something on Judge Schultz's calendar?

23 MS. ZIMMERMAN: We don't, but we'd be happy to
24 reach out and make sure that that happens.

25 MAGISTRATE SCHULTZ: We can do that today.

1 THE COURT: All right. We're all together now.

2 MS. ZIMMERMAN: Wonderful. We will make that
3 contact.

4 THE COURT: Okay, that's great. Thank you very
5 much. Mr. Blackwell?

6 MR. BLACKWELL: Good morning, Your Honors.

7 THE COURT: Good morning.

8 MR. BLACKWELL: First, I wanted one to say that
9 Ms. Pruitt couldn't be here today. She had a family
10 vacation that was planned for this time, and I told her her
11 judgment was poor that she decided to be with her family,
12 but she didn't listen to me, Your Honor.

13 THE COURT: She didn't go on some meditation
14 retreat at least.

15 MR. BLACKWELL: She did not. She said that's only
16 for strange people who do that on a vacation.

17 We see good benefit in supplementing the
18 bellwether pool now, as is we spent a great deal of time
19 with respect to the various PTOs that have been put into
20 place and efforts leading toward the bellwether trials that
21 should teach us something. And thus far, we have tried a
22 long latency case for plaintiff from South Carolina. And
23 that within this bellwether pool and all the cases we've
24 seen, there ought to be much that can be gleaned and learned
25 from trying some additional cases.

1 THE COURT: What do you think about the utility of
2 the Court travelling to a different jurisdiction, even one
3 where there hasn't been a *Lexecon* waiver to try a case? It
4 seems like there are couple of cases that are really
5 sticking in people's craws. I mean we can go try them in
6 those jurisdictions, I suppose.

7 MR. BLACKWELL: I think short of even appearing
8 before another sort of population in some other part of the
9 country, there's much to be learned from the cases that are
10 right here before this Court with plaintiffs that have
11 different attributes, different latencies, different ages,
12 different bacteria that are at issue, et cetera.

13 And, obviously, should Your Honor go to some other
14 state to sit and to try a case, in the event, this is just
15 my projection into the future, if that doesn't resolve in
16 the way the plaintiffs will like, well, that wouldn't have
17 taught us anything either, and they will be looking to go to
18 somewhere else to try yet another one.

19 But the reason that it's, the fact is about a
20 quarter of the cases that have been filed in this MDL are
21 direct filed here in Minnesota anyway. So I think there's a
22 great deal to be learned and to be had. Having said that,
23 we got one trial out of the first round of bellwethers as
24 Your Honor knows, and here in the second pool of the
25 bellwethers, we're already down four. And two of the ones

1 Your Honor just mentioned, *Ramirez* and *Henderson*, were two
2 of the three defense picks that were struck by the other
3 plaintiffs. And those cases they proposed to dismiss at
4 this point when all we've done is collect medical records in
5 those cases, and those are now gone. And mind you, Your
6 Honor, we did spend over \$50,000 collecting medical records
7 in those cases, and it could have been evaluated earlier on
8 without us just wasting the money.

9 But this particular bellwether second pool of
10 cases is likely to substantially dry up too. There will be
11 some statute of limitations issues in the four cases that
12 remain, and very soon we'll be short of having anything in
13 the second pool also. I think it's always helpful for us to
14 have something in place so that we know what's going to
15 happen next in the event we set out to try the next case in
16 the MDL.

17 The bucketizing idea we like also for a number of
18 reasons, and it initially rose under the heading of
19 settlement discussions, but even beyond that, it's hard for
20 us to have a discussion about the docket generally until we
21 can first clean it up to some extent, get statute of
22 limitations stuff addressed, no product ID, that sort of,
23 well, junk that's in the docket. It's a bloated docket.

24 The other thing that I think the bucketizing would
25 help us to do is to put the cases in different categories,

1 and that may give us some incites into what might be useful
2 cases to try from different buckets, whether it's here or
3 somewhere else.

4 THE COURT: All right. I'm speaking to you both
5 now, is what I am sensing makes sense is that we not do
6 anything about repopulating the bellwether pool until you
7 have a chance to have this meeting that you're going to set
8 up momentarily with the Magistrate Judge?

9 MR. BLACKWELL: Yes.

10 MS. ZIMMERMAN: Okay, Your Honor.

11 THE COURT: Okay, makes sense?

12 MR. BLACKWELL: Very good.

13 THE COURT: Okay, good. The motions to remand are
14 denied. 4,956 cases pending?

15 MS. ZIMMERMAN: Slightly more than that, Your
16 Honor. I'm told by the Pritzker firm that as of this
17 morning is 4,969 cases and that does back out those cases
18 that have been dismissed. Although, it's not been updated
19 based on the Court's Orders this morning.

20 THE COURT: Yeah, I saw on the daily activity
21 report that they're --

22 MS. ZIMMERMAN: And one additional piece of
23 information that I asked Wendy Thayer to pull for me, and
24 thank you to her if she is on the phone, was information
25 about how many cases have been filed in the past 90 days.

1 And the reason I thought that might be useful to Your Honor
2 and talking with defense counsel, so there have been 216
3 cases that have been filed in the last 90 days. That's
4 important because pretrial order number 14 really deals with
5 these kinds of issues that continue to come up with respect
6 to is there really a product ID issue, all of that, because
7 pretrial order 14, of course, sets forth how they can
8 challenge that.

9 For all but those 216 cases, they've already had
10 the opportunity to look through the plaintiff fact sheet and
11 to the extent that there are any kind of deficiencies,
12 including with respect to product ID, there would already be
13 a motion brought to this Court to have it dismissed.

14 So to the extent that there are ongoing
15 representations that there are problems with a bloated
16 docket where there's not really proof of product, that's not
17 reflected in the kind of motions that have been brought to
18 the Court.

19 So because in pretrial order 14, any plaintiff has
20 I think it's 90 days to file a fact sheet, and then based on
21 that Order, the defendants then have four weeks to challenge
22 with respect to any kind of core deficiencies, one of which
23 is proof of product.

24 So to the extent that we are through that kind of
25 time period, we do know that there haven't been motions on

1 the vast majority of the cases that are presently pending
2 before the Court.

3 THE COURT: That's a bucketizing point.

4 MS. ZIMMERMAN: That is a bucketizing point, yes,
5 Your Honor, but we hadn't had that data point before, so I
6 thought I would share that with the Court.

7 THE COURT: The related State Court proceedings?

8 MS. ZIMMERMAN: We do have --

9 THE COURT: And there's an oral argument scheduled
10 in the Minnesota Court of Appeals in early November.

11 MS. ZIMMERMAN: Yes, Your Honor, November 7th.
12 And then, of course, based on the Minnesota statute, we will
13 know one way or the other about that appeal on or before
14 February 7th.

15 THE COURT: Because of the 90 day rule.

16 MS. ZIMMERMAN: 90 days, yes.

17 THE COURT: And if I didn't say so before, the
18 stay of all bellwether work pending resolution of the *Gareis*
19 motions and the *Gareis* appeal, that motion is denied.

20 Let me ask my courtroom deputy if there's anything
21 else we need to cover?

22 (Off the record discussion between Court and
23 clerk.)

24 THE COURT: I think we've covered everything.

25 MS. ZIMMERMAN: I think we have too.

1 THE COURT: Anybody else on the plaintiffs' table?

2 MS. CONLIN: No, Your Honor.

3 MR. ASSAAD: No, Your Honor.

4 THE COURT: And, Mr. Blackwell, anything from your
5 table?

6 MR. BLACKWELL: One thing, Your Honor.

7 Again, just to clarify with respect to the
8 bellwether second that we know what's going to wait
9 bucketizing conference, which may be a series of meetings.
10 With respect to those four bellwethers, is it the Court's
11 wish that we hold off on working those up?

12 THE COURT: No, no, no.

13 MR. BLACKWELL: We can move forward?

14 THE COURT: Move forward on them.

15 MR. BLACKWELL: All right, so that's one. Thank
16 you, Your Honor.

17 The second is with respect to *Ramirez* and
18 *Henderson*, and we get they propose to dismiss those, but it
19 was just based on the basis of just the medical records
20 cases that were a year old, and we did have to spend over 50
21 grand collecting those records, and we think that's -- we
22 had a discussion with Your Honor before we came and asked
23 for costs, and I remember the words, "you know, Mr.
24 Blackwell, you have won," and I stopped talking and moved
25 on. We may like to --

1 THE COURT: Not on this.

2 MR. BLACKWELL: Not on this, that's correct. It
3 was on some other issue. And which I --

4 THE COURT: You're excessively broadening your
5 words.

6 MR. BLACKWELL: I'm trying not to carry over, but
7 we may want to kind of at least raise or be able to kind of
8 brief the issue of costs incurred in a case that's a year
9 old that is dismissed this late when we had to incur \$50,000
10 in collecting medical records, when there was no other
11 discovery done other than collecting medical records, that
12 it was then dismissed.

13 THE COURT: I think the plaintiffs are listening
14 to you. I think they heard it.

15 MR. BLACKWELL: I'm sorry, Your Honor?

16 THE COURT: I think the plaintiffs heard what you
17 just said.

18 MR. BLACKWELL: Right, right. All right, I'll
19 leave it at that, Your Honor. So we'll brief it, raise it,
20 and whether it be with presumably Your Honor or Judge
21 Schultz.

22 THE COURT: Seems like it.

23 MR. BLACKWELL: All right. Thank you, Your
24 Honors.

25 THE COURT: Okay. What about the silent portion

1 of the defense table? Anything? No?

2 MS. YOUNG: No, Your Honor.

3 MS. AHMANN: No, Your Honor.

4 THE COURT: No, no, no.

5 MR. BLACKWELL: The longer we stay, about a
6 scheduling order with respect to the four bellwether second
7 cases, would Your Honor like for us to propose we did
8 propose something but I think we should revisit that and
9 perhaps confer with the plaintiffs.

10 THE COURT: We've got an alternate trial date,
11 don't we?

12 MR. BLACKWELL: Yes, for mid-May.

13 THE COURT: And that's what you want to talk
14 about?

15 MR. BLACKWELL: Yes, and putting the schedule in
16 place that works backward from there, Your Honor.

17 MS. ZIMMERMAN: We're happy to confer.

18 THE COURT: I think that's best. I think I'd only
19 get in the way if I tried to do it right here right now
20 without the opportunity for you to discuss it and for you to
21 talk to the Magistrate Judge.

22 MR. BLACKWELL: Yes.

23 THE COURT: Okay. We are in recess. Thank you
24 very much.

25 (Court adjourned at 11:38 a.m.)

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REPORTER'S CERTIFICATE

I, Maria V. Weinbeck, certify that the foregoing is
a correct transcript from the record of proceedings in the
above-entitled matter.

Certified by: s/ Maria V. Weinbeck

Maria V. Weinbeck, RMR-FCRR